STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

JASON MICHAEL DAMRON,

Defendant-Appellant

UNPUBLISHED
August 22, 1997

No. 187486
Calhoun Circuit Court
LC No. 95-000056-FH

Before: Sawyer, P.J., and Bandstra and E. A. Quinnell*, JJ.

MEMORANDUM.

Defendant was convicted of first-degree home invasion. He was sentenced to ten to twenty years in prison. He now appeals and we remand for resentencing. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred in rejecting his timely request that the jury be instructed on the lesser included misdemeanor offense of entry without permission. MCL 750.115; MSA 28.310. Although accurately citing *People v Steele*, 429 Mich 13; 412 NW2d 206 (1987), the trial court misconstrued a key aspect of the four-part test first established in *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982). The second element of that test requires a two-part inquiry: (1) whether the greater and lesser offenses both relate to the protection of the same interests, and (2) whether they are related so that proof of the misdemeanor is necessarily presented as part of the proof of the greater charged offense. *People v Steele*, *supra*, 429 Mich at 19.

Both statutes protect occupied dwellings against uninvited intruders. But the principal distinction between home invasion and entry without permission is the intent to commit a felony or a larceny inside the dwelling. The home invasion statute applies whether the intrusion is by means of a breaking and entering or merely an entry without permission, so the element of a breaking which formerly distinguished the now repealed breaking and entering statute as applied to occupied dwellings vis-a-vis the offense of entry without breaking, MCL 750.111; MSA 28.306, no longer obtains.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

The third element of the *Steele-Stephens* test is that proof of the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant not guilty of the greater and guilty of the lesser included offense. *People v Steele*, *supra*, 429 Mich at 20. Here, the only distinguishing and disputed element was whether at the time of the entry defendant had intent to commit a felony once inside the dwelling. By denying the requested instruction, the jury was deprived of the opportunity to focus its attention on the key disputed factual issue and the error cannot be deemed harmless on this record. *People v Herbert Ross*, 73 Mich App 588, 594; 252 NW2d 526 (1977), adopted in *People v Beach*, 429 Mich 450, 453 ff; 418 NW2d 861 (1988).

We remand for entry of a judgment of conviction of entry without permission and for resentencing, but the prosecutor shall have the option of new trial per *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975), and *People v Hoffmeister*, 394 Mich 155, 157 n 1; 229 NW2d 305 (1975). This renders unnecessary discussion of any remaining issues. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Edward A. Quinnell